VIRGINIA LAW REGISTER

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Governmental Agencies—The Western Union Telegraph Company.

Very little attention has been paid to a decision of the Supreme Court of the United States rendered on December 23, 1912, in the case of Williams, Agent of Western Union Tel. Co. *v.* The City of Talladega. Had this decision been rendered within the first fifty years of this government we do not suppose there is a solitary newspaper from one end of the country to the other that would not have commented upon it—those representing the Federal party with approval and those representing the Democratic-Republican party with horror.

The city of Talladega laid a license tax of one hundred dollars upon each person, firm or corporation commercially engaged in business sending messages to and from the city, to and from points in the State of Alabama for hire or reward, and required the Western Union Telegraph Company to pay this tax. The Supreme Court of Alabama sustained the tax as a proper exercise of the police power of the city, as well as for the purposes of raising revenue. The defendant company claimed immunity from taxation because, by the Act of 1866, Congress, by virtue of the authority given it to establish post roads, conferred Federal franchises upon the company and made the Western Union Telegraph Company an instrumentality of the Federal government and endowed with franchises to construct, maintain and operate telegraph lines on the post roads of the United States, with a duty not only to serve the government of the United States but also to serve the public which desired to transact business over its lines. This being the case, the court held that the ordinance imposing the license tax without exemption was void, in that it taxed the privilege of carrying on a business, a part of which is that of a governmental agency constituted under the laws

of the United States and engaged in an essential part of the public business—communication between the officers and departments of the federal government.

If this be the case, then how can a State impose a license tax upon a railroad which carries United States mail? Is not that equally engaged in the business of carrying messages and communications between the officers and departments of the Federal government? It will be noted that this license tax was upon the business of sending messages entirely within the State.

The United States Supreme Court is generally able when it comes to a pinch to get around the too-far reaching effect of its decisions, but it seems to us it will have a hard time to get around this decision if the question of the franchise tax upon a railroad ever comes up before it, especially if the railroad was to avail itself of the Act of 1866. It is a little hard to reconcile the later decision of Ewing *v.* The City of Leavenworth, decided by the same court on January 6, 1913, with this decision. Here a tax was imposed upon the United States Express Company by way of a license on the business of said company, entirely intrastate, although the curious fact was stated in this case that no package could be brought into or sent out of Leavenworth except by making a short passage through Missouri. The court held that this, like the baby in Maryatt's novel, was too little to count for much, and declared the tax valid, although in the case of Handley *v.* K. C. S. Railway Company, 187 U. S. 617, the court had held a similar license tax void because only fifty-two miles were within the State of Arkansas and the rest out of the State. The case last decided is a somewhat severe application of the *de minimis* idea.

The Recent Bar Examination.

The last examination given by the Board of Law Examiners in Richmond on January 15th and which was published in our February number, is easily the most difficult examination that has ever been presented to applicants for admission to the Bar in this State, and in our humble judgment is much severer than is necessary to test the ability of the would-be practitioner unless a very judicious scale of marking is in force with the Board. Whilst a member of

the Board denies that it is the policy of that body to restrict as far as possible the number of men to be licensed to practice in this State, examinations of this character will necessarily have that effect, whether this be the policy of the Board or not.

This member of the Board assigned three causes for the failure of so large a number to pass: First, that the applicants study old questions and it is the policy of the Board never to ask them; second, that applicants the night before are apt to indulge too freely in alcoholic liquors; and third, that applicants who have not completed the law course or who are not otherwise sufficiently grounded in the elementary principles of the law, do not understand the questions propounded. As to the second reason there cannot of course be any argument, for a man who prefers to frolic the night before so important a matter as his examination for admittance to the Bar, ought not to be licensed to practice law even if he stood the examination; and it is not to be regretted that such persons fail; but with regard to the first reason we believe that a careful review of the old questions furnishes a very good guide for any review that the student must make in preparation for an examination and we can see no reason why questions of a similar nature should not be asked. In fact, it is very hard to see how an examination on elementary principles can be had without going over some of the old ground. One of the very incidents quoted by the gentleman of an absurd answer to a perfectly plain and easy question bears us out in this. One applicant in reply to a question asked him, "In what cases has the Supreme Court original jurisdiction?" replied, "In misdemeanor cases." The applicant could not have fallen into this error if he had examined previous questions, for this same question had been asked very many times before.

As for the third reason advanced by the member of the Board, we have always thought that the examination should be upon elementary principles, more than particular cases or hard subjects. There is no doubt, as suggested, that undergraduates should be discouraged from taking the examination and we happen to know that the Law Faculty of the University of Virginia counsels its students to refrain from applying until they have completed their course and, we are inclined to think, place ob-

stacles in the way of students' taking this examination prematurely.

Needless to say we have the highest confidence in every member of the Examining Board and they have always shown the utmost desire to be perfectly fair to every candidate, and wherever either the professors in colleges or applicants have shown dissatisfaction with the failure in any particular case the Board has been perfectly willing to take the matter up to the end that all concerned should be convinced and satisfied. As a result of one of these "post mortems" one of the leading teachers of the law in this State was so well satisfied that the Board was right in rejecting the applicant that he stated, "This student got what was coming to him." However, some of the best papers handed in have been those of non-degree men and undergraduates.

Limitation on Right of Attorneys to Qualify.

And this reminds us that the following proviso has been carried from § 3191 of the Virginia Code into the amended section which created the Board of Law Examiners and took out of the hands of the Court of Appeals the duty of examining applicants for admission to the Bar:

"Provided the attorney at law holding the same has already commenced the practice of his profession or shall commence the practice thereof within two years from the date of the granting of said license—otherwise, the said attorney shall not practice in this State without first obtaining a license as provided by this act."

By this proviso *all licenses heretofore legally granted* are validated, provided the attorney at law holding the same has already commenced the practice of his profession, *or shall commence the practice thereof within two years from the date of the granting of said license.*

Now it is a matter of common knowledge that the purpose of this proviso originally was to prevent those who had taken that merely nominal examination held before a single judge from entering upon the practice of law unless he did so within two years

after taking it. It was a penalty. Of course many who contemplated practicing law but who were not at the time prepared to commence at once stood this examination merely to avoid the more rigid examination then provided for before the Court of Appeals. But this legislation, as contained in the statute creating the Board of Law Examiners, apparently impose this limitation not only upon such persons referred to above, but also upon those who have stood the examination before the Court of Appeals; at least, that is our construction of this act. But the policy of this proviso was never intended to bar such persons. In other words, the evils intended to be corrected are non-existent now and there would seem to be no reason for embracing this proviso in the present statute, unless the framer of such enactment intended to do great injustice to those who had already passed an adequate examination. Aside from this the act is very ambiguous and difficult of construction. For example: "When has a person commenced the practice of his profession" within the meaning of these terms as used in the statute? Is holding one's self out to the public as an attorney necessary? If so, what constitutes holding one's self out as a practitioner? Is it necessary to pay the license fee? Moreover very few judges in the State seem to be aware of the existence of this limitation and hence many attorneys are qualified before our courts who may not be entitled to do so. We cannot see what sound policy is subserved by tacking this penalty for delay on those that may at the time be unable to enter upon the practice immediately upon passing the examination or even within two years thereafter.

Deeds—Restraints on Alienation—Validity.

B, a married woman, received land under a grant, for her sole and separate estate, with right of disposal by will, "but without power to mortgage or otherwise incumber, or to sell or convey the same during her life" *A statute of Kentucky, in existence when the conveyance was made, gave married women the right to convey or devise their separate estates unless forbidden by the instrument under which such estates were acquired.* B contracted to sell the land to defendant C who then refused to

perform because B could not give a good title. Held, that B had a fee and could sell during her life, and that C must perform, for the restraint on her right to alienate the land given her was void as unreasonable. Cropper *v.* Bowles (Ky. 1912), 150 S. W. 380.

As a general proposition, when an estate is given to one in fee, restrictions against alienation are void as against public policy. 13 Cyc. 687; 2 Tiffany, Real Property, 1135; Murray *v.* Green, 64 Cal. 363; Munroe *v.* Hall, 97 N. C. 206; Miller *v.* Denny, 99 Ky. 53; Booker *v.* Booker, 104 N. Y. S. 21; Diamond *v.* Rotan, 124 S. W. 196; Pritchard *v.* Baily, 113 N. C. 521; Teany *v.* Mains, 113 Ia. 53; Latimer *v.* Waddell, 119 N. C. 370. There is an exception to this general rule, that there may be a restriction placed on the alienation of property granted, if it be reasonable. 13 Cyc. 687; Munroe *v.* Hall, 97 N. C. 206. For example, a condition that the grantee shall not alienate for a particular time, or to a particular person, is good. Langdon *v.* Ingram's Guardian, 28 Ind. 360. Or a restriction is good if for the life of any person in existence at the time of the grant. M'Williams *v.* Nisly, 2 Serg. & R. 507. Also a condition, where husband and wife were grantees in equal parts, that the wife should not sell or incumber her half, was held good in Hicks *v.* Cochran, 4 Edw. Ch. 107. Finally, a restraint on alienation may be imposed in granting the separate estate of a married woman, especially where the estate is an equitable one. 13 Cyc. 687; 2 Perry, Trusts, §§ 670-1; 2 Tiffany, Real Property, 1138; Camp *v.* Cleary, 76 Va. 143.

It is exceedingly hard for us to understand how the Kentucky Court ever arrived at the conclusion they did in this case, for we cannot see how the restraint can be adjudged unreasonable; for to hold it reasonable would be merely to carry out the exact wording of the statute; for the provision against alienation by Mrs. B. during her life was contained in the grant to her. The cases cited by the Court—Stewart *v.* Brady, 3 Bush. 623, and Harkness *v.* Lisle, 132 Kentucky 767—while they discuss a general rule against alienation, do not touch on the exception of married women's estates.

We have no such statute at present in the State of Virginia but the question is one not without interest. Our courts, it is

true, have steadily set their faces against restraints upon alienation where there was anything in the deed which could be construed to give the party a fee, but would it not be possible in this State still in spite of our Married Woman's Act, to convey property to a married woman with the provision that if she should encumber, mortgage, or otherwise attempt to convey the same, the property should vest in some third party, to be held in trust for her benefit. We have known one case in which one of the ablest lawyers in the State advised that this could be done in order to establish a spendthrift trust, and we can see no good reason why such an estate should not be given to a married woman as separate estate, with a proviso containing a restraint against her squandering it in her lifetime, and thereby insure her against poverty and want.

Liability of a Promoter for Security of Profits.

The Supreme Court of the State of Indiana in the case of Barker *v.* Boyle, 99 N. E. 986, has rendered an important decision which it will be well for our organizers of corporations to bear in mind; for while a great many of such organizers have been of the opinion that after the Corporation Commission had passed upon the question of the issuing of stock for property all future trouble was barred except in cases of direct fraud, we are strongly inclined to think that the language of the court of Indiana in the case named would be that adopted by the courts in our State. That Court said in part as follows:

"While a promoter, notwithstanding the fiduciary relation, may sell property to the company which he is promoting, he may do so lawfully only when he shall have provided an independent board of officers, in no wise under his control, and make a full disclosure to the corporation through them; or when he shall have made a full disclosure of all material facts to each original subscriber for shares of stock in the corporation; or when he shall have procured a ratification of the sale, after disclosing its circumstances, by vote of the stockholders of the completely established corporation."

We believe that the law as thus laid down is just and proper

and it is certainly sustained by all the principles of common right and justice.

Anti-Salooners in Antic-Behavior.

The monstrous and measureless evil wrought by the use of intoxicating liquors is generally admitted by all thinking people. This hydra-headed and remorseless monster with ceaseless and tireless energy, wastes the substance of the poor, manufactures burdensome taxes for the public, monopolizes the valuable time of the courts, fills jails, penitentiaries, and asylums, ruins homes, destroys manhood, terrorizes helpless women and innocent children, baffles the church and mocks the law, and, in answering its inexorable demands, "each new morn new widows mourn, new orphans cry, new wrongs strike Heaven in the face." These are the products of a curse not imposed by the decree of God, but self-inflicted by the voluntary conduct of man, its weak and wicked victim. Judges of all classes of criminal courts, speaking from official experience, have grown weary in calling attention to the drink habit as one of the principal causes of crime, and nothing that we may say can add to this manifest truth. And we venture to say that if all men in Virginia could be made sober, prisons would be well-nigh vacant, the chain gang system would fall into an innocuous desuetude, and cities, towns and villages throughout this State would witness the renaissance of many poverty stricken, miserable and unhappy families. That great English Premier did not exaggerate when he declared that "greater calamities have been inflicted on mankind by intemperance than by the three great historical scourges—war, pestilence and famine," and this evil is "the measure of a nation's discredit and disgrace." Bearing all this in mind it is with regret that we note the downfall and humiliation of the so-called Law and Order League. We are at a loss whither to turn for our uplift and fear that there is "no help in us." In Scott *v.* O'Hara (Ky.), 151 S. W. —, we find the Anti-Saloon League engaged in compounding felonies and selling their birthright for a few pieces of silver. This league, which had started a number of prosecutions against the plaintiff for the illegal sale of intoxicating liq-

uors, in collusion with the judge of the police court, stifled the same by extorting money from the plaintiffs whom they alleged had violated the liquor law. In an action by the plaintiff to recover back this money, the court applied the rule of *in pari delicto potior est conditio defendentio* and denied any recovery. This all goes to show that this evil can never be successfully reformed by any such organization, but depends on education and enlightenment.

Progressive Whist.

Our ladies who "toil" at those wonderful games called bridge and progressive whist will be very much surprised to hear that in the "tight little island" across the herring pond they would be liable to get themselves in trouble in case they played them in the British Isles and that under the Gaming House Act in England the ladies who are in the habit of having bridge parties regularly at their houses would be liable to prosecution. In Morris *v.* Godfrey, decided April 26th, 1912, it has been held to be clear law in England that any person who conducts on his premises a "progressive whist" competition under the usual conditions is guilty of using the premises for "unlawful gaming" within the meaning of the Gaming Act, 1859, § 4. To constitute "unlawful gaming" it is not necessary that the games played should be unlawful games; it is sufficient that the play is carried on in a "common gaming house," i. e., a house in which a large number of persons are invited habitually to congregate for the purpose of gaming. (See Gaming Act, 1845, and Gaming Houses Act, 1854, § 2.) The fact that the user of the premises is confined to a limited class such as the members of a club is no defence, provided the user is "habitual" (Jenks *v.* Turpin; 53 L. J., M. C. 161). But a man who occasionally games with a party of friends in his own house cannot be said to be guilty of "habitually" keeping it open for gaming (Regina *v.* Davies, 66 L. J., Q. B. 513). The games played must be games of chance, not games of skill; but the question as to which of these categories is entitled to the inclusion of any particular game is not a question of fact for the jury, but one of law for the judge (Regina *v.* Davies, supra).

It seems a rather curious conclusion of law, however, that the question as to what is a game of chance should be one of law, especially in view of the peculiar ruling of Mr. Justice Avery in Morris *v.* Godfrey, 76 J. P. 298, which was that the fact that persons of both sexes take part in the game of progressive whist is an important consideration in determining whether it is a game of chance. Whether the learned judge meant to reflect upon the skill of the ladies or held that any game in which a woman took part must necessarily be a game of chance we leave to the consideration of those more versed in this matter than ourselves.

Our New Editorial Associate.

Readers of the REGISTER will notice that the name of Mr. James F. Minor, Associate Editor, no longer appears in this periodical, and that with the present number Mr. S. B. Fisher becomes an Associate Editor. Mr. James F. Minor has removed to the city of Richmond and under most auspicious circumstances has commenced the active practice of his profession. The Editors associated with Mr. Minor in the conduct of this publication unite in wishing him the degree of prosperity and success to which his talents so plainly entitle him. During his editorial connection the relation between himself, the Editor in Chief, and his Associate Editor were of the most harmonious and cordial nature. We shall miss his exceeding carefulness, his wondrous ability for taking pains and his earnest desire to make this periodical worthy of the profession in Virginia. The numerous annotations to cases signed with his initials are the best evidences of the nature of his work, and have always met with the highest commendation.

The REGISTER is to be congratulated upon having secured Mr. Fisher as Mr. Minor's successor. Mr. Fisher has been for some years connected with the Michie Company and his work upon the Encyclopedia of United States Supreme Court Reports and other works published by the Michie Company should assure our readers that his efforts on behalf of this journal will be such as to continue the approval and patronage of the profession.